Supreme Court, U.S.
FILED

96 547 OCT 7 1996

OFFICE OF THE CLERK

No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

JOHN DOE,
Cross-Petitioner,
vs.
DANIEL E. LUNGREN, Attorney General
of the State of California,
Respondent to Cross-Petition.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

LAWRENCE SILVER & ASSOCIATES,
A Law Corporation
LAWRENCE SILVER
MARK E. FIELD
111 West Ocean Boulevard
Suite 1900
Long Beach, CA 90802-4649
Telephone (310) 901-4500
Fax (310) 901-4520

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

QUESTIONS PRESENTED FOR REVIEW

1. Is California Penal Code Section 401 — which prohibits deliberately aiding, advising, or encouraging another to commit suicide — unconstitutional in making it a felony for physicians to aid mentally competent, terminally ill adults in ending their lives painlessly and with dignity?

2. What are the differences between "facial" and "as applied" challenges to the constitutionality of a statute, including what are the circumstances under which the different challenges are proper; what showing must be made to sustain a "facial" challenge as opposed to an "as applied" challenge; and what is the appropriate remedy in each of the two challenges?

LIST OF PARTIES

All parties are identified in the list of parties contained in the Petition for Certiorari of Daniel E. Lungren.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Summary Of Facts	3
B. Basis For Federal Jurisdiction In The District Court	7
REASONS FOR GRANTING REVIEW	8
I. WHETHER THE UNITED STATES CONSTITUTION PROTECTS THE RIGHT TO PHYSICIAN AID IN DYING CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	8
A. Further Proceedings In The Ninth Circuit Would Be Superfluous	9
B. The Issue Of Physician Aid In Dying Is Of Imperative Public Importance	10
II. THIS COURT SHOULD SETTLE THE FUNDAMENTAL QUESTION OF THE DISTINCTION BETWEEN "FACIAL" AND "AS APPLIED" CHALLENGES TO STATUTES	13
III. CONCLUSION	15

TABLE OF AUTHORITIES

Federal Cases Cited

Page

Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) 14

Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992) 14

Bolling v. Sharpe, 344 U.S. 873, 73 S.Ct. 173 (1952), 347 U.S. 497, 74 S.Ct. 693 (1954) 9

Casey v. Planned Parenthood, 14 F.3d 848 (3rd Cir. 1994) 14

Chester v. St. Louis Housing Authority, 873 F.2d 207 (8th Cir. 1989) 13

Compassion in Dying v. State of Washington, 79 F.3d 790 (9th Cir. 1996), *stay granted sub nom. Washington v. Glucksberg,* 116 S.Ct. 2494 (June 10, 1996) (No. A-974), *rehearing en banc by full court denied, Compassion in Dying v. State of Washington,* 85 F.3d 1440 (June 12, 1996) (No. 94-35534), *cert. granted,* 65 U.S.L.W. 3085 (Oct. 1, 1996) (No. 96-110) 8, 9, 12, 13, 14

Fargo Women's Health Organization v. Schafer, 18 F.3d 526 (8th Cir. 1994) 14

Janklow v. Planned Parenthood, Sioux Falls Clinic, U.S. , 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996) 14

Planned Parenthood Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995) 14

Porter v. Dicken, 328 U.S. 252, 66 S.Ct. 1094 (1946) 9

Quill v. Vacco, 80 F.3d 716 (2nd Cir. 1996), *cert. granted,* 64 U.S.L.W. 3795 (Oct. 1, 1996) (No. 95-1858) 8, 12, 13

TABLE OF AUTHORITIES

FEDERAL CASES CITED

Page

Taylor v. McElroy, 358 U.S. 918, 79 S.Ct. 291 (1958), 360 U.S. 709 (1959) 9

U.S. v. Mandel, 914 F.2d 1215 (9th Cir. 1990) 9

United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) 14, 15

Federal Statutes Cited

28 U.S.C. § 1254 2

28 U.S.C. § 1331 7

28 U.S.C. § 2101 2

28 U.S.C. § 2201 ..... 3, 7

42 U.S.C. § 1983 ..... 2, 7

Federal Rules of Civil Procedure, Rule 54 ..... 7, 13

Rule 10 of the Rules of the Supreme Court 8

Rule 11 of the Rules of the Supreme Court 2, 8, 9

U. S. Constitution, Fourteenth Amendment 2

California Statutes Cited

California Penal Code Section 401 ..... i, 3, 7, 13

California Health and Safety Code Sections 1785.5(b) and (c) 11

No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

JOHN DOE,
Cross-Petitioner,
vs.
DANIEL E. LUNGREN, Attorney General
of the State of California,
Respondent to Cross-Petition.

On-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner John Doe respectfully requests that a writ of certiorari issue to review the judgment of the United States District Court of the Central District of California entered September 20, 1996, prior to judgment in the Ninth Circuit:

OPINION BELOW

The Order and Judgment of the United States District Court for the Central District of California are contained in the Appendix to the Petition for Certiorari filed by Daniel E. Lungren, Attorney General of the State of California.

JURISDICTION

The District Court issued its Order on September 11, 1996, and entered judgment on September 20, 1996. Petitioner Lungren filed a Notice of Appeal to the Ninth Circuit on September 25, 1996, which was docketed on October 2, 1996 (No. 96-56405). **John Doe files this Cross-Petition for Writ of Certiorari under Rule 11 of the Rules of the Supreme Court.**

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and this Cross-Petition is timely pursuant to 28 U.S.C. § 2101(e).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides in relevant part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

28 U.S.C. § 2201 provides in relevant part as follows:

"In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and decree and shall be reviewable as such."

California Penal Code Section 401 provides as follows:

"Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."

STATEMENT OF THE CASE

A. Summary Of Facts.

Until about the middle of the 19th Century, human beings died primarily of infectious and parasitic diseases, often exacerbated by famine or epidemics of specific pestilences or plagues. In this Century, the causes of death have changed: most people are now likely to die later in life of degenerative diseases rather than parasitic and infectious ones. The majority of people now face death at a comparatively predictable time, later in life, from diseases with long, generally predictable downhill deteriorative declines.

The specific case of John Doe exemplifies the prolonged deterioration common with AIDS, which is now the leading cause of death for Americans 25-44. John Doe first tested HIV positive in July, 1984. Diagnosed as having AIDS on January 1, 1993, he is in the advanced final stages of this disease and has been advised by his physician that his condition is terminal. John Doe is a mentally competent

adult who is aware of the nature of his disease and its likely progress.

Since July, 1987, John Doe's CD4 count has dropped from a high of 518 to a current level of 0. The normal range of this count would be 537-1571.

In August, 1994, John Doe was diagnosed with CMV Retinitis. Cytomegalovirus Retinitis leads to loss of vision and eventually blindness. He was initially treated for this by the insertion of a catheter in his right arm, but this had to be removed due to infection. He then received medication for this disease by injection directly into his eye.

In March, 1995, John Doe was diagnosed as having Kaposi's Sarcoma in his throat. At the same time, he was diagnosed as infected with mycobacterium avium complex ("MAC"), which causes chronic night sweats, fever, chills, malaise, nausea, bone pain, and other symptoms.

One year ago, when he filed his Motion for Summary Judgment, John Doe took the following medications on a daily basis: Cytovene (an antiviral medication), Bactrim (an antibiotic), Tylenol plus Codine, Zovirax (an antiviral medication), Diflucan (an antifungal), Mycobutin (an antibiotic for treatment of MAC), and Neupogen (to raise his white blood cell count). He also took a number of vitamin and mineral supplements daily and had prescriptions for Ativan (anti-anxiety) and Vicodin (a narcotic analgesic) on an as-needed basis. At various times he had been prescribed Cipro, Velosef, and Flagyl (all antibiotics). Despite these medications, John Doe suffered from chronic fatigue and neuropathy, and had been hospitalized four times in the previous 2½ years with pneumonia, abdominal pain, fever, nausea, intense joint aches and pains, and anorexia.

Over the past year he has lost 35 lbs., 25% of his body weight. The neuropathy has confined him to bed 24 hours per day for the last 8 weeks. The CMV has spread to his

other eye, and he suffers from pancreatitis and loss of kidney function. The fever, chills, etc. of MAC have persisted for the entire year. His *daily* medications, many of which cause significant unpleasant side-effects (e.g., nausea, diarrhea, kidney problems, feminization, impotence), now include Indinazir (an anti-viral for AIDS); Pyrazinamide (for MAC); Ethambutol (same); Biaxin (antibiotic); Dapsone (for MAC); Diflucan; Lamivudine (antiviral for AIDS); Vasotec (anti-hypertensive); AZT (for AIDS); Megestrol (appetite stimulant); Neupogen; Epogen (for white cell count); steroid shots; Percocet (pain relief); Vicodin; Foscarnet infusions (for CMV); nausea medication; and a morphine patch which he wears 24 hours a day.

AIDS patients may die in many different ways. Patients with Kaposi's Sarcoma frequently die from invasion of this cancer into the lungs, causing progressive difficulty in breathing and ultimately death by suffocation. Many die of pneumonia, which also causes the patient to suffocate. Many with wasting or dementia die of starvation and dehydration, a process that can take weeks and can be excruciating; some of the patients lose so much weight that they appear skeletal and their bones may break through their skin, an exquisitely painful, physically debilitating and psychologically devastating condition. CMV Encephalitis and CMV Polyradiculomyelopathy, which result when CMV invades the brain and spinal cord, respectively, cause death in a few weeks to months. The patient suffers weakness in the extremities — leaving him or her wheelchair-and then bed-bound — headache, fever, delirium, double vision, difficulty swallowing, and seizures. Others die as the result of one or more of 15-20 infections that resist treatment. Most patients suffer from at least several of these conditions, and there are patients with as many as a dozen.

AIDS patients typically die in a slow, prolonged, and extremely painful process. By the time that health care professionals agree that there is no hope for any meaningful quality of life and deem patients "end stage", patients are often emaciated beyond belief, reminiscent of starving individuals in Ethiopia or the dead photographed concentration camp victims from World War II. During this stage, patients usually lose control of all bodily functions, especially urination and defecation, and are rendered helpless, often bed-bound, lying in their own excrement. Because of the multitude of opportunistic infections and AIDS-associated tumors, all end-stage AIDS patients can suffer from intractable pain.

Repetitive or continuous parenteral narcotic analgesics such as intravenous morphine sulfate and hydromorphone hydrochloride can palliate the dying process in many cases for AIDS patients. However, in some cases, the pain and discomfort can be relieved only with drugs which render the patient unconscious; in some cases even such aggressive use of drugs does not bring relief. Once parenteral narcotics are used in an accelerated dose fashion, the dying course can take anywhere from a few hours to several days or weeks.

In all terminal illnesses, there are circumstances in which a patient may suffer pain, debility, or disfigurement. Two circumstances make discussion of aid in dying more common in AIDS patients. First, in general AIDS patients are younger and typically die at a much younger age than, say, cancer patients. Second, as is well known, the AIDS virus has struck particularly hard in the gay community. Because the disease is concentrated in a particular group, AIDS patients are far more likely to know someone else with the disease than is customarily true for other illnesses. This is particularly true since the disease is relatively new and its impact has been concentrated in a 10-15 year span rather than the much longer time frame during which a person's

contemporaries ordinarily die. AIDS patients are therefore fully aware of the "worst case scenarios" in a way that sufferers from other long term, debilitating illnesses frequently are not.

John Doe has seen friends and acquaintances succumb to AIDS, including those who have spent their final days in horrible pain. He does not want that fate to befall him, and wants to be able to obtain physician aid in dying.

Only physicians have the specialized knowledge of which drugs will be effective for a painless and effective suicide, how much to take, what their shelf life is, and how to prevent unwanted side effects. Only physicians have the ability to obtain such drugs from a reliable source guaranteeing their effectiveness. Some patients cannot hasten their death without assistance, or could do so but only at the risk of increased anguish and pain to themselves and their families.

John Doe needs expert advice and assistance in order to obtain the drugs necessary to ensure a painless and effective control of his death.

B. Basis For Federal Jurisdiction In The District Court.

John Doe brought suit in the United States District Court for the Central District of California pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, claiming that California Penal Code Section 401 violates the Constitution of the United States, specifically the Fourteenth Amendment. The District Court, exercising jurisdiction under 28 U.S.C. § 1331, entered an Order finding in his favor based upon the liberty interest protected under the Fourteenth Amendment's due process clause, and entered judgment in accordance with that Order pursuant to F.R.C.P. 54(b).

Daniel E. Lungren, Attorney General of the State of California, filed a Notice of Appeal of the District Court's

Judgment, and then filed a Petition for Writ of Certiorari before judgment in the Court of Appeal as permitted under this Court's Rule 11. Although the District Court entered Judgment in John Doe's favor, leaving him with no need for appellate relief, John Doe recognizes that this case presents substantial grounds for exercise of this Court's discretion under the first clause of Rule 10(c), and that this Court has granted certiorari in two cases raising substantially the same issues as this case, namely *Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. 1996), *stay granted sub nom. Washington v. Glucksberg*, 116 S.Ct. 2494 (June 10, 1996) (No. A-974), *rehearing en banc by full court denied, Compassion in Dying v. State of Washington*, 85 F.3d 1440 (June 12, 1996) (No. 94-35534), *cert. granted*, 65 U.S.L.W. 3085 (Oct. 1, 1996) (No. 96-110) and *Quill v. Vacco*, 80 F.3d 716 (2nd Cir. 1996), *cert. granted*, 64 U.S.L.W. 3795 (Oct. 1, 1996) (No. 95-1858). In order to define the issues properly, John Doe files this Cross-Petition for Writ of Certiorari asking this Court to affirm the Order and Judgment of the District Court.

REASONS FOR GRANTING REVIEW

I.

WHETHER THE UNITED STATES CONSTITUTION PROTECTS THE RIGHT TO PHYSICIAN AID IN DYING CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Three states, Washington, New York, and now California, have submitted petitions seeking review of whether the Constitution protects physician aid in dying. Although the imperative public importance of the issue is clear enough from those petitions, John Doe is unique in seeking relief before this Court as a patient, rather than a physician; his is the most immediate right presented for vindication and the

most urgent in terms of his health. The fact that the Ninth Circuit, which must hear any appeal of this case, has ruled definitively on this issue further justifies a grant of certiorari.

A. Further Proceedings In The Ninth Circuit Would Be Superfluous.

John Doe invokes Rule 11 in part based on the procedural status of this case. The District Court relied expressly on *Compassion in Dying, supra*, which is controlling authority within the Ninth Circuit. *U.S. v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990) ("[W]e may reconsider an earlier Circuit precedent only when 'an intervening Supreme Court decision undermines an existing precedent . . . ' "). *Compassion in Dying* was decided *en banc* and the Ninth Circuit just 3 months ago denied rehearing by the full court. That decision is as complete and final as is possible within that Circuit, rendering further proceedings there superfluous.

This case is thus in the same procedural posture as *Taylor v. McElroy*, 358 U.S. 918, 79 S.Ct. 291 (1958), 360 U.S. 709, 710 (1959), in which this Court granted certiorari. See also, *Bolling v. Sharpe*, 344 U.S. 873, 73 S.Ct. 173 (1952), 347 U.S. 497, 498, 74 S.Ct. 693, 694 (1954) and *Porter v. Dicken*, 328 U.S. 252, 254, 66 S.Ct. 1094, 1095 (1946). Further review by the Ninth Circuit would simply take time which John Doe does not have; this Court can and should resolve the issue.[1]

---

[1] Petitioner Lungren takes the position that Doe's death would render this case moot. Doe believes that if that were to occur, the case should proceed as one capable of repetition yet evading review. This issue might be avoided by prompt review in this Court.

B. The Issue Of Physician Aid In Dying Is Of Imperative Public Importance.

The issue of assisted suicide is substantially a by-product of modern medicine. Where in the past most people died relatively early and quickly from various diseases, most today face death later in life from diseases with long, generally predictable deterioration.

Although John Doe is terminally ill with AIDS, this is by no means a case limited to AIDS. Death frames the lives of us all, and the prospect of a lingering end stage confronts every single American. A brief description of the number 2 cause of death in this country will reinforce this point.

Cancer is the term commonly applied to a group of more than 100 types of disease originating in the various organs of the body, each characterized by uncontrolled growth of cells with the ability to spread throughout the body. Cancer is newly diagnosed in more than 1 million Americans annually, and 1 of 5 deaths in the United States — about 1,400 per day — results from cancer.

A majority of cancer patients report pain or the use of analgesic drugs daily. A majority of these had pain severe enough to impair their ability to function.

Certain types of cancer cause pain which is frequently severe. For example, lung cancer can spread to the bones, causing severe pain, fractures, and complete immobility. Ovarian cancer can result in untreatable bowel obstruction, causing relentless abdominal pain and vomiting. Nor is pain the only unmanageable symptom that cancer can produce. Progressive paralysis due to brain or spinal cord metastasis can be caused by many types of cancer. Shortness of breath, to the extent that patients feel they are suffocating, can be extremely distressing and panic-provoking, and can also occur with many types of cancer. Despite the best efforts of medical treatment, it is sometimes not possible to provide

these patients relief from such symptoms except perhaps with doses of narcotics that render the patient unconscious or virtually so. Short of such doses of medication, at times one cannot attain real relief of symptoms.

In Los Angeles, it is an acceptable standard of community care to offer patients who are terminally ill with cancer (6 months or less to live) the option of placement in a home hospice program where attempts will be made to provide palliative care. In this group of patients, treatments to extend quality life have failed and the team of health care providers has no more to offer the patient except to attempt to assist them through the process of death in a dignified and pain-free manner.

Once a patient, legal guardian, or other qualified person decides that death is imminent, all unnecessary life-prolonging treatment is discontinued, and parenteral narcotics are used in an accelerated dose fashion to control pain and anxiety ("morphine drips"). In these situations, death usually occurs in a few hours, but can take several days.

AIDS, like cancer, kills after a prolonged period of disability. There have been over 440,000 cases of AIDS reported in the United States, with another million HIV+. More than 250,000 Americans have already died from AIDS-related causes, and AIDS is now the leading cause of death among Americans between the ages of 25 and 44.

Both cancer and AIDS can leave patients in severe pain and cause humiliating debility, both sometimes untreatable by even the highest quality medical care. This prolonged dying process is inhumane to the patients, as has been recognized both by the medical profession and California law (e.g., California Health & Safety Code § 1785.5(b) and (c)). Under such circumstances, it is hardly surprising that patients with diseases such as cancer and AIDS ask their physicians to help them to a dignified and painless death.

John Doe's personal circumstances emphasize the immediacy of this issue, not just for him, but for the hundreds of thousands of Americans who must face death over the coming months. In the year since John Doe filed his Motion for Summary Judgment, his condition has deteriorated substantially. He has lost 35 pounds in that year, 25% of his bodyweight. For the last 8 weeks he has been confined to bed 24 hours per day as a result of neuropathy (severe pain in the extremities). The CMV has moved into his other eye, his T cells are gone, he has pancreatitis and loss of kidney function, and for a year has suffered constant fever, chills, and night sweats. He takes more serious medication daily (over 20 prescriptions) than many of us will take in our lives, yet none of them can cure AIDS or prevent his death.

If John Doe alone had to face this prospect, this Court should still consider his personal need to exercise the right at issue here. But the circumstances of modern medicine force thousands of Americans to face a prolonged death under similar circumstances.

Excepting only those who die suddenly and without warning, every American citizen will one day face the decision whether and how to control the timing of his or her death. This issue arises every day, in every state, and is of immediate practical and philosophical concern to patients, to families, and to physicians. It is difficult to imagine a more pervasive and important question of private right than this: whether the Constitution protects the fundamental right of Americans to control the manner and means of their death.

To settle this fundamental question, this Court has been offered competing constitutional interpretations by the courts in *Compassion in Dying*, *supra* (liberty under the Fourteenth Amendment) and *Quill*, *supra* (equal protection). The case of John Doe presents not only both of these, but also the argument, not raised in these other cases, that the right to privacy, independent of the right to liberty,

protects this fundamental right. Granting certiorari in his case will permit *full* exploration of the factual predicates and legal analysis essential to this issue.[2]

II.

THIS COURT SHOULD SETTLE THE FUNDAMENTAL QUESTION OF THE DISTINCTION BETWEEN "FACIAL" AND "AS APPLIED" CHALLENGES TO STATUTES

John Doe specifically challenged California Penal Code Section 401 as "facially" invalid. The District Court's Order specifically upheld this facial challenge, and the Judgment entered declares that Penal Code Section 401 is "unconstitutional on its face." Unlike *Compassion in Dying*, 79 F.3d at 798 n. 9, and *Quill*, *supra*, John Doe's Petition presents

---

[2]Doe's description of the issues requires a brief explanation of the procedural status of this case. The District Court based its ruling entirely on the liberty interest recognized in *Compassion in Dying*. John Doe also presented authorities supporting the same conclusion on equal protection and right to privacy grounds. The District Court's Order did not mention right to privacy, and specifically sought "guidance" from higher courts on what it apparently considered to be a separate "claim" based upon the equal protection clause. Petitioner Lungren adopted the view that the equal protection claim was separate and distinct from the due process claim and proposed a stipulated judgment pursuant to F.R.C.P. 54(b) on the due process "claim", reserving for later determination the equal protection "claim". John Doe believes that due process and equal protection are merely legal arguments in support of one claim, *Chester v. St. Louis Housing Authority*, 873 F.3d 207, 208-9 (8th Cir. 1989), but agreed to the stipulated judgment because of the need to expedite review in his personal circumstances and because entry of judgment would have followed his view of the case had it been adopted by the District Court, albeit more slowly; thus, appellate review is proper in either event. John Doe submits that this Court can and should provide the "guidance" sought by the District Court on the equal protection issue, whether it does so in *Quill*, *supra*, or in this case.

the issue of what it means to bring a "facial" challenge to the constitutionality of a statute.

The significance of this issue is well known to this Court. Substantial numbers of constitutional challenges are brought every year. It is critically important for those challenging statutes to understand the circumstances under which they may be challenged, the showing necessary, and the relief which may be sought.

For a couple of years now, Courts of Appeal have expressed uncertainty about the meaning of the language used in this Court's decision in *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). E.g., *Planned Parenthood Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-8 (8th Cir. 1995); *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994); *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n. 21 (3rd Cir. 1994). The uncertainty is such that the Ninth and Fifth Circuits have stated conflicting views over the meaning and continued vitality of *Salerno*. Compare *Compassion in Dying, supra*, 79 F.3d at 798 n. 9, with *Barnes v. Moore*, 970 F.2d 12, 14 n. 2 (5th Cir. 1992). Controversy over the meaning of *Salerno* has surfaced even in this Court, with several Justices commenting on it in denying certiorari in *Janklow v. Planned Parenthood, Sioux Falls Clinic*, ___ U.S. ___, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014, 113 S.Ct. 1668, 1669, 123 L.Ed.2d 285 (1993); and *Ada v. Guam Society of Obstetricians and Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992).

Because the District Court agreed with John Doe on the propriety of a facial challenge in this case, this issue is presented directly for resolution here, but not in *Compassion in Dying* or *Quill*. This Court should welcome the opportunity to resolve an issue of such importance.

III.

CONCLUSION

John Doe's case is unique in being presented by a still-living patient; unique in squarely presenting the *Salerno* issue; and unique in asserting a separate right to privacy. The two issues he has identified are of imperative public importance, and his medical condition creates an urgent personal need for final resolution. For the reasons set forth herein, John Doe requests that this Court accept review and affirm the judgment of the District Court.

Dated: October 2, 1996

LAWRENCE SILVER &
ASSOCIATES
LAWRENCE SILVER
MARK E. FIELD

By: MARK E. FIELD
Attorneys for Cross-Petitioner
John Doe